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No. 363

In the Supreme Court of the United States

OCTOBER TERM, 1933

THE ARROW-HART & HEGEMAN ELECTRIC COMPANY,
Petitioner.

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION

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THE CASE, LOCKWOOD & BRAINARD CO.
HARTFORD, CONN.

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, The Arrow-Hart & Hegeman Electric Company, a Connecticut corporation, respectfully prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Second Judicial Circuit to review a judgment of that Court entered on June 6, 1933, which affirmed by Judges Manton and Augustus N. Hand (Judge Swan dissenting) an order of the Federal Trade Commission, respondent herein, entered against your petitioner on July 6, 1932. A transcript of the record in the case, including the proceedings in the Circuit Court of Appeals, is furnished herewith pursuant to Article 38 of the Rules of this Court.

Summary and Short Statement of the Matter Involved

This is a proceeding by the Federal Trade Commission alleging violation of the provisions of section 7 of the Clayton Act (15 U. S. C. A., sec. 18), the pertinent paragraph of which section reads:

> "No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

The Commission assumes to have jurisdiction over, and authority to enter its present sweeping order against, the petitioner, which was formed through the physical merger of two small Connecticut manufacturing corporations, because of the following facts:

Those two small companies were The Arrow Electric Company (herein called Arrow) and The Hart & Hegeman Manufacturing Company (herein called Hart & Hegeman), the capitalization of which was, in 1927, as follows:

	Common Stock (par $25)	Preferred Stock (par $100)
Arrow	$750,000	$2,000,000
Hart & Hegeman	500,000	1,333,300

For many years Arrow and Hart & Hegeman had been manufacturers of electrical wiring devices which they marketed nationally, the former under the

"Arrow" brand, the latter under the "H. & H." brand. In 1927 41% of the total business of Hart & Hegeman was not competitive with Arrow; Arrow emphasized, and had a reputation in the trade for its socket line whereas Hart & Hegeman emphasized its switch line and was thought of by the trade in general as primarily a switch manufacturer.

In the early part of 1927, Mr. Shiras Morris, president of Hart & Hegeman, died. He had been a dominating figure in the company, and he and his family had owned more than a majority of its common stock. The loss of Mr. Morris left Hart & Hegeman without an assured position in the electrical wiring device industry. In view of this situation, Mr. Morris' widow and her advisers decided that, for the best interests of herself and her family, their stock should be sold. Several months' effort to find a suitable purchaser for this stock was fruitless. In July of 1927, however, informal negotiations were opened with Mr. Grier, then executive head of Arrow. These negotiations culminated in the incorporation, under Connecticut laws, of Arrow-Hart & Hegeman, Incorporated (herein called the holding company) which was formed to acquire, and did acquire, in October of 1927 the common capital stocks (and the common capital stocks only) of both Hart & Hegeman and Arrow.

The holding company was formed not to suppress or lessen the competition which existed between the two manufacturing companies but solely to achieve manufacturing economies and improvements. Indeed, the holding form of company rather than an outright merger was advocated at the time because it seemed best calculated to work out the desired manufacturing affiliation while preserving the competitive situation and the good will attaching to the separate brands. And

during the life of the holding company, which was from October 1927 to December 1928, it made no attempt to influence the sales policies or practices of the two manufacturing companies and, in fact, these sales policies and practices continued independently and exactly as always before. The Commission found no facts showing that, during the period of the holding company, there was any restraint of trade or lessening of competition but only that manufacturing economies and improvements were effected.

On March 3, 1928, the Commission issued a complaint against the holding company, charging it with a violation of section 7 of the Clayton Act, cited above.

Thereafter, in early December of 1928, the holding company, to meet the criticism of the Commission and thereby to put an end to the pending litigation, but nevertheless without prejudice to its rights, believing it had not violated the law, distributed its assets and dissolved.

In dissolving, the holding company's original plan had been to distribute its assets directly to its stockholders. However, upon being advised that such distribution might involve its stockholders in a heavy, liquidation profit tax, it distributed its Arrow common stock to a tax company which was formed for the purpose of receiving it and distributed its Hart & Hegeman common stock to another tax company similarly formed. The capital stocks of the two tax companies were issued directly to the stockholders of the holding company, this constituting the consideration for the distribution described. As a part of this tax program, the holding company had proposed a plan of reorganization (but was itself powerless to carry it out) which contemplated a later merger between the two manufacturing companies and the two tax companies.

The contemplated merger, resulting in the petitioner, took place on December 31, 1928, under the laws of Connecticut, following action by the stockholders (both preferred and common) of Arrow and Hart & Hegeman and of the two tax companies, but not of the holding company which was in dissolution.

The holding company did not organize the petitioner. The undisputed facts of the record show conclusively that it did not. At the time the merger was voted by the other companies, the holding company had been in dissolution for some three weeks, i.e. since December 10, 1928. None of the four companies involved in the merger considered the merger or took any action upon it until after December 10, 1928. The stockholders of each of the four companies at the time of the merger were free to do as they chose. Moreover, the Commission has ignored, and the Circuit Court of Appeals has apparently not properly understood, the fact that *the vote of the preferred stocks of the two manufacturing companies was as necessary to merger as was the vote of the common stocks; no merger could be effected without the affirmative vote of at least two-thirds of the preferred stocks. No share of these preferred stocks—stocks which represented about 73% of the capitalization of the two companies—was ever owned or controlled by the holding company.* The preferred stockholders never had any connection with the holding company and did not act on the merger until after that company was in liquidation.

The public has suffered no injury through the formation either of the holding company or, later, of the petitioner; on the contrary, the voluminous evidence in the record on the subject is all to the effect that this coming together of the two manufacturing companies has affirmatively benefited the public since, by virtue

of the manufacturing economies and improvements made possible thereby, it has meant lowered prices, improved quality (in which safety is a big factor), more new wiring devices and, to some communities, it has meant continued service which might otherwise have had to be seriously curtailed or abandoned.

So far as monopoly or tendency to monopoly is concerned, it appears that in 1927 the combined "Arrow" and "H. & H." business amounted to about 24% of the business of the industry while in 1929 it amounted to less than 19% thereof (1927 and 1929 were the only years for which United States census figures were available at the time of the trial), and that the petitioner had some seventy active competitors, among them the General Electric Company and the Bryant Electric Company (a subsidiary of Westinghouse Electric and Manufacturing Company). The Circuit Court of Appeals makes no finding of any tendency to monopoly but it fails to remark upon the actual trend away from monopoly as disclosed by the 1929 figures.

As to restraint of trade: the Commission produced not one competitor, not one jobber, not one ultimate consumer, not one member of the general public, who found the affiliation and later merger of the two manufacturing companies objectionable; the petitioner, on the other hand, through proper officers, deliberately produced two of its foremost competitors, the General Electric Company and the Bryant Company, who found this affiliation and merger beyond criticism.

Before the merger was effected, the essential facts of it were laid before the Department of Justice of the United States which offered no objection to it.

On January 11, 1929, the Commission was formally notified that the holding company was in dissolution and that the petitioner had been formed. During the

succeeding five months no objection or protest of any kind was received from the Commission. On June 29, 1929, it filed its supplemental complaint in this proceeding, naming the petitioner as a co-respondent. On October 11, 1929, the cause was at issue on the supplemental complaint. The Commission, however, made no move to take testimony in the case until May 25, 1931, some *nineteen* months later. The delays in prosecution were inexcusable and have operated most unfairly upon the petitioner and its stockholders, by virtue of the fact that, during these delays as well as at other times, the petitioner has gone steadily forward building for the future, working out manufacturing economies and improvements in design, winning good will, etc. The Commission's order against the petitioner (Record, p. 261) was entered on July 6, 1932. Although the petitioner was but a co-respondent, no order was issued against the holding company.

The order in this case is one which, in effect, would tear the petitioner into two parts; it is obviously improbable that either part could survive, or could flourish, under so heroic an operation, particularly in view of the distressed condition in which business finds itself today. Thus the Commission's order, if enforced, would work good to no one. On the contrary, it would work a distinct disservice to the general public in annihilating, or greatly weakening, the Arrow and the H. & H. lines, or one of them; it would throw many persons out of work at a time when the Federal Government is directing every energy to restoring employment throughout the country; it would injure many innocent stockholders and especially those preferred stockholders, constituting a considerable segment of the general public, who played no part in the formation of the holding company and who represented 73% of the

capitalization of the two manufacturing companies involved; and, by entirely removing, or all but removing, a strong competitor from the electrical wiring device industry might tend to weaken the vigor of the competition now prevailing in that industry,—a result which our law makers could hardly have intended.

And so severe a penalty is imposed simply because it is considered that there was error in the formal machinery employed. Had the two companies merged in the first place not even the Commission would have claimed a violation of law; but because a less drastic affiliation was first worked out through the medium of a holding company (which, ironically enough, was chosen to preserve the competitive situation between the two companies) the guilt is said to be deep and to warrant a wrecking of the petitioner.

Reasons Relied on for the Granting of a Writ of Certiorari

The discretionary power of this Court is invoked upon the following grounds:

1. The decision of the Circuit Court of Appeals below, holding that absence of injury in fact to the public is not material in a prosecution under section 7 of the Clayton Act, involves a question of vast importance to business and to the general public and is in conflict with principles enunciated in decisions of this Court, particularly in *International Shoe Company* v. *Federal Trade Commission*, 280 U. S., 291, 74 L. ed., 431 and note, 1930, and in *Appalachian Coals, Inc., et al* v. *United States*, 53 Sup. Ct. Rep., 471, 1933.

2. The decision of the Circuit Court of Appeals below is in conflict with the decision of the Circuit Court of Appeals for the third circuit rendered in *Temple*

Anthracite Coal Company v. *Federal Trade Commission*, 51 Fed (2d) 656, 1931; these two courts have reached opposite conclusions upon an important question of Federal law which, even apart from the stated conflict, should be finally settled by this Court.

3. In affirming the order of the Commission which directs the petitioner to divest itself absolutely of physical properties although it never acquired and does not now hold a single share of the capital stocks of either the Arrow or the Hart & Hegeman manufacturing companies, and although such a divestment would be confiscatory not only of the interests of common stockholders but also of preferred stockholders who neither directly nor indirectly were connected with the former holding company, the Circuit Court below has decided important questions of Federal law which have not been, but should be, settled by this Court.

4. The finding of the Commission, affirmed by the Court below, that the former holding company organized the petitioner is untenable as a matter of fact and of general law and is oppressively unjust.

Wherefore it is respectfully submitted that the writ of certiorari should issue as prayed.

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August 19, 1933.

BRIEF FOR PETITIONER IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI

A subject index and a table of cases and statutes cited will be found at pages i-ii, *supra*.

The Opinions of the Court Below

The Circuit Court of Appeals for the Second Circuit delivered two opinions in this case. The first opinion directs itself to two motions and is reported in 63 Fed. (2d), 108; it appears also in the Record, at page 1039. The second opinion directs itself to the merits of the case and is reported in 65 Fed. (2d), 336; it appears also in the Record, at page 1043.

Jurisdiction

The foregoing petition for a writ of certiorari is filed under the provisions of Section 240 (a) of the Judicial Code of the United States as amended by an Act of Congress of February 13, 1925 (U.S.C., title 28, sec. 347, [28 U.S.C.A., sec. 347]), and in accordance with section 350 of that Code and Article 38 of the Rules of this Court.

The case arises under and involves sections 7 and 11 of the Clayton Act (U.S.C., title 15, sections 18, 21 respectively [15 U.S.C.A., sections 18, 21]). The judgment of the Circuit Court of Appeals below, whose jurisdiction was invoked under section 11 of the Act referred to, affirms an order entered by the Federal Trade Commission against the petitioner, this order being based upon a finding by the Commission that the petitioner had violated section 7 of this Act. The relevant portion of section 7 is quoted in the petition,

supra, at page 2. The relevant portion of section 11 of the Act confers authority upon the Commission to enforce compliance with section 7 and, in conjunction with machinery for prosecution, prescribes the method of enforcement, to wit, the issuance of an order requiring the offending corporation "to cease and desist from such violations, and divest itself of the stock held * * *"; it also vests in the Circuit Court of Appeals of the United States jurisdiction to enforce, set aside or modify any order issued by the Commission.

The date of the judgment to be reviewed was June 6, 1933; the date upon which the foregoing petition for a writ of certiorari is presented to this Court is August 19, 1933.

Some of the cases believed to sustain the jurisdiction of this Court are *International Shoe Company* v. *Federal Trade Commission*, 280 U. S., 291, 1930, *Federal Trade Commission v. Western Meat Co.*, 272 U. S. 554, 1926, *Swift and Co.* v. *Federal Trade Commission*, 272 U. S. 554, 561, 1926, *Thatcher Manufacturing Company* v. *Federal Trade Commission*, 272 U. S. 554, 560, 1926.

Statement

The facts are sufficiently stated in the petition, *supra*, at pages 2-8.

Specification of Errors

The errors which the petitioner will urge if the writ of certiorari is granted are that the Circuit Court of Appeals for the Second Circuit erred:

1. In holding that the petitioner violated section 7 of the Clayton Act notwithstanding the fact that neither it, nor the holding company which existed prior

to its formation, ever caused injury to the public but, on the contrary, benefited it.

2. In holding (a prerequisite to its judgment against the petitioner) that the holding company violated section 7 of the Clayton Act in acquiring the common stocks of the Arrow and the Hart & Hegeman manufacturing companies.

3. In holding that the holding company organized the petitioner.

4. In holding that, under sections 7 and 11 of the Clayton Act, the Commission has jurisdiction over the petitioner, a corporation which never acquired, held, owned or controlled a single share of the capital stocks of either the Arrow or the Hart & Hegeman manufacturing companies.

5. In holding that the Commission has the power, under section 11 of the Clayton Act, to order the petitioner to divest itself of physical properties which it acquired, not through the use of capital stock, but by virtue of the physical merger which brought it into being.

6. In holding that, except as it may be incidental to an order directing stock divestment, section 11 of the Clayton Act confers power on the Commission to direct a corporation to divest itself absolutely of physical properties.

7. In holding that the Commission's order, which if carried into effect would cut the petitioner in two, may disregard and virtually confiscate the property rights of the greatly preponderant group of preferred stockholders who played no part in the organization or life of the holding company.

8. In affirming the order of the Commission.

Summary of Argument

The points of argument follow the reasons relied upon for the allowance of the writ of certiorari, *supra*, pages 8-9.

Argument

1. *The decision of the Circuit Court of Appeals below holding that absence of injury in fact to the public is not material in a prosecution under section 7 of the Clayton Act involves a question of vast importance to business and to the general public and is in conflict with principles enunciated in decisions of this Court.*

There is no question but what the transactions complained of by the Commission in this case not only did not injure, or tend to injure, the public in fact but, on the contrary, affirmatively benefited it. There is no dispute in the record on the subject. By virtue of the formation of the holding company, the Arrow and the Hart & Hegeman manufacturing companies were enabled to effect great economies and to work many improvements in their manufacturing processes. These were reflected directly in lowered prices and improved quality of merchandise offered to the public. With the merger of the two manufacturing companies into the petitioner identical benefits were realized, and will continue to be realized, by the public. In addition, the merger has made possible the continued offering of both the "Arrow" and the "H. & H." lines in territories to which one or both of them might otherwise have been lost.

As to monopoly, it has been pointed out (*supra*, page 6) that in 1927 the Arrow and Hart & Hegeman business combined amounted to approximately 24% of the total business of the electrical wiring device industry

while in 1929 it had dropped to less than 19% thereof; also that the petitioner has some seventy active competitors, including such powerful corporations as the General Electric Company and the Bryant Electric Company (Westinghouse). The Court below finds no tendency towards monopoly, but fails to remark upon the 1929 figures which show that the actual tendency has been *away* from monopoly.

The transactions complained of by the Commission have not restrained, or tended to restrain, trade in the electrical wiring device industry. Not only did the Commission produce no witness, whether competitor, jobber or ultimate consumer, who complained against the petitioner on this score, or on the score of tendency to monopoly, but the petitioner itself called as witnesses two of its principal competitors who gave it unequivocal acquittance in the matter.

Under these circumstances, is a prosecution under section 7 of the Clayton Act proper? It is respectfully submitted that the affirmative answer of the Circuit Court of Appeals below erroneously construes this Act, the proper construction of which is of great importance to business and to the public generally, and is in conflict with principles enunciated by this Court, particularly in *International Shoe Company* v. *Federal Trade Commission*, 280 U. S. 291, 74 L. ed., 431 and note, 1930, and in *Appalachian Coals, Inc., et al.* v. *United States*, 53 Sup. Ct. Rep., 471, 1933.

In the first case named, the International Shoe Company acquired all of the capital stock of the W. H. McElwain Company. This acquisition was attacked by the Commission under section 7 of the Clayton Act. It appeared that in respect of 95% of the business of the two companies there was no competition; also that, at the time of the acquisition complained of, the McElwain

Company was in failing circumstances and that its actual failure would have resulted in loss to its stockholders and injury to the communities where its plants were operated. Although section 7 of the Act involved makes no reference to such contingencies or to the public interest generally, this Court held that there had been no prejudice to the public within the meaning of the Act (280 U. S., 297-8, 302-3) and that the Shoe company was not guilty of violating it.

The essence of this decision, we submit, is the absence of injury to the public. This Court simply carried to the Clayton Act, as if had previously carried to the Sherman Act (15 U.S.C.A., sec. 1), the rule of reason. Neither act, it should be especially noticed, makes any mention of the public interest. Logically, there can be no reason for holding that the actual absence or presence of injury to the public shall be of paramount importance with respect to one act but not with respect to the other.

Among other things, this Court says in its opinion, at pages 297-8:

> "Section 7 of the Clayton Act, as its terms and the nature of the remedy prescribed plainly suggest, was intended for the protection of the public against the evils which were supposed to flow from the undue lessening of competition. In *Standard Oil Co.* v. *Federal Trade Commission*, 282 Fed. 81, 87, the Court of Appeals for the Third Circuit applied the test to the Clayton Act which had theretofore been held applicable to the Sherman Act, namely, that *the standard of legality was the absence or presence of prejudice to the public interest by unduly restricting competition or unduly obstructing the due course of trade.* In *Federal Trade Commission* v. *Sinclair Co.*, 261 U. S. 463, 476, referring to the Clayton Act and the Federal Tade Commission Act, this Court said:

"The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain."

"Mere acquisition by one corporation of the stock of a competitor, even though it result in some lessening of competition, is not forbidden; the act deals only with such acquisitions as probably will result in lessening competition to a substantial degree, *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 357; *that is to say, to such a degree as will injuriously affect the public.* Obviously, such acquisition will not produce the forbidden result if there be no pre-existing substantial competition to be affected; for the public interest is not concerned in the lessening of competition, which, *to begin with*, is itself without real substance." (Italics ours).

The Circuit Court below, adopting the argument of the Commission, has interpreted the *Shoe* case to mean that the public *ipso facto* is injured where, as in the case at bar, the products of the two corporations involved were in substantial competition with one another, i.e., 59% of the products of the Hart & Hegeman company were in competition with the products of the Arrow company (65 Fed. (2d), 340). We believe this interpretation to be untenable. In the *Shoe* case it was held that there was no infraction of the Clayton Act because there had been no injury to the public; that the public had not been injured because it had no concern in a lessening of competition which, "*to begin with*," was insubstantial, *also* because the company whose stock was acquired was in failing circumstances. Each of these reasons was held to be adequate in itself (opinion, p. 303). There was no need to push the inquiry further. The Court below entirely overlooks the

fact that, in resolving the question of the presence or absence of injury to the public, this Court did not confine itself to an examination of the competitive situation which had existed between the two companies. The test announced in the *Shoe* case obviously is: has the public been injuriously affected by the stock acquisition complained of? It is the test, not the factual situations of a particular case, which is important.

The position taken by the Commission, and affirmed by the Court below, is reminiscent of that taken by the Government in prosecutions brought by it under the Sherman Act (15 U.S.C.A., sec. 1) before the promulgation of the rule of reason in *Standard Oil Company v. United States*, 221 U. S. 1, 49, et seq., 1911. Section 1 of that Act, it will be recalled, provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several States, or with foreign nations, is hereby declared to be illegal * * *."

In the *Standard Oil* case counsel for the Government argued that this rigid language (more rigid indeed than that of section 7 of the Clayton Act) embraced *every* contract, combination, etc., in restraint of trade, and hence that its text left no room for the exercise of judgment but simply imposed the plain duty of applying its prohibitions to every case within its literal language. (221 U. S. 63). The Court, however, read into the act the now familiar rule of reason, the doctrine that only such restraints as were harmful to the public should be condemned. While the Court thus departs from the literal wording of the Act, its construction is an eminently reasonable one, recognizing as it does that a standard of interpretation was contemplated and required, and that the administration of an act framed

in the public interests should not be blind to actualities but should seek only to guard and promote those interests in fact.

The Federal Trade Commission, though now faced with the *Shoe* case (which it seeks to bend in its own direction), nevertheless continues to argue for a blind, harsh and inflexible construction of section 7 of the Clayton Act, and the Court below has found this argument valid. The argument runs substantially thus: section 7, which was passed in the public interest, condemns every corporate stock acquisition the effect of which may be to substantially lessen the competition existing between two or more corporations; therefore, by legislative fiat, any such acquisition is *per se* injurious to the public and illegal and the Courts are without power to inquire into the actual facts. There is a perfect parallel between this argument and that formerly taken by the Government in prosecutions based on the Sherman Act. The argument can have no more validity in the one case than in the other. Consequently, we submit that the decision of the Court below conflicts and is inconsistent not only with the *Shoe* case but also with that standard of legality, i.e., the standard of reasonableness, heretofore held applicable, in numerous decisions of this Court, to the Sherman Act.

In *Appalachian Coals Inc., et al.* v. *United States*, 53 Sup. Ct. Rep. 471, 1933, a case arising under the Sherman Act, an agreement, or combination, between 137 coal producers, under which competition between them would be blotted out, was held legal since no injury to the public appeared. Question was raised as to whether, in attaining their objectives, these companies should not have integrated their properties under one ownership to be within the law. This Court (page 480) held that substance, not form, was the important thing.

In the case at bar, the Circuit Court below regards form, not substance. Ignoring the realities, it finds injury to the public in the machinery of affiliation employed. However, whether a case arises under the Sherman Act or under the Clayton Act, we find the same public, with the same interests, in the background. The position that an affiliation or consolidation injures or does not injure the public according to whether it proceeds by way of a holding company or by way of merger is untenable. It is a matter of common knowledge that a merger is the more sweeping procedure and hence the more likely to affect the public interests in fact. In our opinion, the principles underlying the *Appalachian Coals* decision and the decision of the Circuit Court in this proceeding are irreconcilable.

2. *The decision of the Circuit Court of Appeals below is in conflict with the decision of the Circuit Court of Appeals for the third circuit rendered in* Temple Anthracite Coal Company *v.* Federal Trade Commission, *51 Fed. (2d) 656, 1931; these two courts have reached opposite conclusions upon an important question of Federal law which, even apart from the stated conflict, should be finally settled by this Court.*

The Court below, taking the narrow construction of section 7 of the Clayton Act (15 U.S.C.A., sec. 18) discussed in the preceding topic, i.e., the construction which holds immaterial the absence of actual injury to the public in a given case, holds that the acquisition by one corporation (not solely for purposes of investment) of all or a substantial part of the capital stocks of two or more solvent corporations engaged in commerce and in substantial competition with one another is necessarily and *per se* illegal under the act. Is this a

correct holding? This question, the answer to which is of obvious importance to the business world and to the public generally, is answered in the negative in the *Temple* case. (It should not be inferred that the Circuit Court of Appeals for the third circuit, in deciding the *Temple* case, first considered and accepted the narrow construction of the Clayton law heretofore discussed, —such is not the fact). In the case at bar the contrary conclusion is reached. While the language of the Court's opinion is somewhat obscure, to reach that result the Court must necessarily have derived any guilt now attaching to the petitioner from guilt first attaching to the holding company by virtue of its acquisition of the common stocks of the Arrow and the Hart & Hegeman manufacturing companies.

As to the guilt of the holding company, we recall to this Court's attention the fact that it was formed to acquire, and did acquire, the common stocks of the two companies involved not for the purpose of suppressing the competition which existed between them but for the sole purpose of effecting economies and improvements in manufacture while at the same time preserving the competition described; and that, during the entire corporate life of this holding company, which was from early October of 1927 to early December of 1928, the sales policies and practices of the two manufacturing companies continued as always before, wholly uninfluenced by the holding company. (See Statement in petition, *supra,* pp. 3-4). "Competition", says the court below, "is eliminated where two formerly competing units are brought under one dominating ownership." (65 Fed. (2d), p. 340).

In the *Temple* case, the Temple Anthracite Coal Company acquired substantially *all* of the capital stocks of two coal corporations which were engaged in com-

merce and whose products were apparently 100% competitive. Notwithstanding the power which might reside in the Temple Anthracite Company as a result of this acquisition, the Court found that the competitive situation between the two subsidiaries had not been affected in fact. "The only effect which the ownership may be found to have brought about is the reduction of overhead and operating expense." (51 Fed. (2d) 660). The company was accordingly given a complete acquittance. The Commission did not carry the case farther.

It may be argued that the *Temple* case does not parallel the present case—and hence that the two circuit courts are not in conflict—because in the present case the Court finds that the holding company organized the petitioner and that, under the petitioner, competition between the former Arrow and Hart & Hegeman companies ceased. The argument, however, is superficial. If the holding company did not violate section 7 of the Clayton Act in acquiring the common stocks of the two companies named, then it did not violate it at all; even taking the Court's finding mentioned just above. The chain of events entailing dissolution of the holding company and subsequent formation of the petitioner through merger was not the natural or probable outcome of the stock acquisition complained of,—it was precipitated solely because of the Commission's election to prosecute.

It is the probabilities attending a stock acquisition with which the Clayton Act is concerned. A corporation is forbidden to acquire the stock of two or more corporations in commerce the effect of which "*may be*" to substantially lessen competition, etc. The acquisition is not *per se* condemned as it might have been had Congress been so minded. The Commission it-

self, in its brief to the Court below, framed the issue thus: "Was the *probable* effect of the acquisition of the common stock of The Hart & Hegeman Manufacturing Company and The Arrow Electric Company on October 10, 1927, by the Arrow-Hart & Hegeman, Inc. (the holding company) (a) to substantially lessen the competition * * *" etc.?

Probable effect, naturally, must be determined as of the date of the stock acquisition complained of. Relevant inquiry in such a determination concerns itself with the objective behind the acquisition and the procedure by which this objective is to be attained. Supervening events may also be relevant as an aid in showing what the objective really was and in throwing light generally upon the probable effects of the acquisition. In the *Temple* case, upon facts varying in no important particular from those of the case at bar, the Court found that probable trend towards lessening of competition, monopoly or restraint of trade had not been shown. Should the Temple holding company now actually vote a physical merger of its two subsidiaries (of which it owns substantially all of the capital stock), it is obvious that no prosecution under section 7 of the Clayton Act, regardless of the effect of such merger, would be maintainable,—this act deals only with the legality or illegality of the original stock acquisition; were the merger illegal it would be because the Sherman Act had become involved.

From the foregoing discussion, it is manifest that in the eyes of the Circuit Court of Appeals for the third circuit the stock acquisition complained about by the Commission in the present case was legal. Had the Commission's original complaint (Record, p. 3) come before the Circuit Court of Appeals for the third circuit for decision upon the merits it would have been

dismissed. No other judgment under the *Temple* case would have been possible. The original complaint having been without merit, there could have been no basis for a supplemental complaint joining the petitioner. It is equally manifest, from the decision of the case at bar, that had the *Temple* case come before the Circuit Court of Appeals for the second circuit, it would have been decided in favor of the Commission. Upon parallel facts, it finds the stock acquisition complained about by the Commission in its original complaint illegal,—upon no other theory can it attempt to discover illegality in the petitioner. A corporation located in a circuit other than the second or third which has acquired, or may acquire, stock under the circumstances discussed could now have no means of determining what view its own Court of Appeals would take. The decisions of the two circuit courts are flatly in conflict.

3. *In affirming the order of the Commission which directs the petitioner to divest itself absolutely of physical properties although it never acquired and does not now hold a single share of the capital stocks of either the Arrow or the Hart & Hegeman manufacturing companies, and although such a divestment would be confiscatory not only of the interests of common stockholders but also of preferred stockholders who neither directly nor indirectly were connected with the former holding company, the Circuit Court below has decided important questions of Federal law which have not been, but should be, settled by this Court.*

It is of vast importance to the business world and to the public generally, more especially in these confused times, to know the scope of the Commission's powers under sections 7 and 11 of the Clayton Act (15 U.S.C.A.,

sec. 18, 21). The order entered by the Commission against the petitioner in the present proceeding sweeps far beyond anything thus far sanctioned by this Court. Judge Swan, who dissented to the judgment of the Court below, was of the opinion that the Commission's order exceeded its jurisdiction (65 Fed. (2d) 340), as was Chairman Humphrey of the Commission who also dissented (Record, p. 264-266). We believe the Commission itself would not claim that jurisdiction for its present order can be found in the language of the Act. Most inconsistently, the Commission is in the position of urging a literal, harsh construction of section 7 of this Act while, at the same moment, requesting broad, implied powers under section 11 thereof. The Act, being in derogation of ordinary rights, we should suppose that proper construction of it would limit rather than enlarge its scope.

Under section 11 of the Act the Commission is empowered to order a corporation which has acquired stock in violation of section 7 to cease and desist from such violation by divesting itself of the stock held. (See *supra*, p. 11). The language of the section is no broader than this although in *Federal Trade Commission* v. *Western Meat Company*, 272 U. S. 554, 1926, it was held that, under the circumstances there described, the order directing the offending corporation to divest itself of the stock which it had illegally acquired, and still held, might include a direction to divest itself also of the physical properties which it had acquired through the exclusive use of such stock.

In the present case, the Commission's order (Record, page 261) amounts to a bald direction to the petitioner to divest itself of physical properties. This direction is in no way incident to an order of stock divestment. The petitioner never acquired stocks in violation of section

7 of the Clayton Act; it never acquired, and does not now hold, any share of the capital stocks of either the Arrow or the Hart & Hegeman manufacturing companies. At the time of its incorporation, i.e., December 31, 1928, it acquired the physical properties of these two companies through the fact of absolute merger, not through the use of their capital stocks. These two companies, indeed, ceased to exist coincidently with the merger. In its order, affirmed by the Court below, the Commission not only exceeds the powers conferred upon it under section 11 of the Act but overleaps, in the first instance, the fact that the petitioner never acquired stocks in violation of section 7.

The Commission, it should be understood, does not concede that the petitioner never itself acquired stocks in violation of section 7 of the Clayton law. Obviously conscious of jurisdictional obstacles, the Commission, in paragraph 2 of its order (Record, pp. 261-262), in an evident attempt to avoid the appearance of directing a divestment of physical properties alone, directs the petitioner to divest itself of all common stocks of the Hart & Hegeman company "acquired by it as a result of the merger" of the four companies involved (see *supra,* pp. 4-5) "so as to include in such divestment" the physical properties of this company, or; in the alternative, to divest itself of all common stock of the Arrow company thus acquired by it so as to include in such divestment its physical properties. However, this order, and the finding upon which it is based (Record, pp. 249-250), are so hollow as to be beyond the bounds of legitimate controversy. In the first place, although the common stocks of the Arrow and the Hart & Hegeman manufacturing companies were assets of the two tax companies involved in the merger (see *supra,* pp. 4-5), all four companies so involved ceased legally to

exist coincidentally with this merger. The petitioner, then, never acquired as assets, or otherwise, and it certainly never held and does not now hold, the stocks of the two manufacturing companies,—there can be no such thing as outstanding capital stock of a company which does not exist. In the second place, the petitioner voted no stocks to acquire the physical properties of the Arrow and the Hart & Hegeman companies,—it acquired those physical properties by the fact of the merger which brought it into being. In the third place, this proceeding is not an original one against the petitioner; the original proceeding was against the former holding company, the petitioner having been brought into it by a supplemental complaint. Could the supplemental complaint be regarded as in the nature of an original proceeding against the petitioner, then it is only necessary to point out that it was instituted about six months after the stock acquisition complained of, there having been, in the meantime, a complete physical merger of the properties of the two manufacturing companies involved. The petitioner's position then would be unassailable under *Thatcher Manufacturing Company* v. *Federal Trade Commission*, 272 U. S. 554, 560, 1926 and *Swift and Company* v. *Federal Trade Commission*, 272 U. S. 554, 561.

Further grave question as to the validity of the Commission's order is found in the fact that it ignores the property rights and interests of the preferred stockholders who played no part in the formation, life or dissolution of the holding company. These preferred stockholders, it will be remembered, represented nearly 73% of the capitalization of the old Arrow and Hart & Hegeman manufacturing companies. (See *supra*, page 5). May the Commission enter an order against the petitioner which is confiscatory of the property inter-

ests and rights of its preferred stockholders? In the *Western Meat* case *supra*, p. 24, relied upon by the Commission, it is to be observed, the offending company had acquired *all* of the capital stock of its competitor, the Nevada Packing Company.

4. *The finding of the Commission, affirmed by the Court below, that the former holding company organized the petitioner is untenable as a matter of fact and of general law and is oppressively unjust.*

A well recognized and ancient principle of the common law is that findings of fact must be within the bounds of reason,—if they are plainly unreasonable they ought to be set aside by a court of law. In the case at bar, there is no conflict whatever in the evidence relating to the dissolution of the holding company and the subsequent formation of the petitioner. Furthermore, the evidence on the point, though voluminous and somewhat complex, is both clear and precise. There is no call either to weigh conflicting evidence or to interpret ambiguous or equivocal evidence. The ultimate conclusion as to whether the holding company did or did not organize the petitioner can be arrived at over paths as certain as those of ordinary mathematics. The finding of the Commission, affirmed by the Court below, that the holding company organized the petitioner is plainly wrong. The only possible explanation of the Court's holding, in our opinion, is that it did not fully grasp the demonstrable facts.

The holding company, in order to aid its stockholders in the matter of a Federal taxation, did announce a plan of merger which was followed. Beyond this it did not go. It attempted no *control*. It was quite impossible for the holding company to organize the petitioner. At the time of the merger (i.e. December 31, 1928), which

resulted in the petitioner, the holding company was in dissolution and had been so for some three weeks. The stockholders of the other four companies concerned were, notwithstanding the statement of the Court below, wholly free to merge or not, as they saw fit. Moreover, under the laws of the State of Connecticut, the vote of the preferred stockholders was as necessary to merger as was the vote of the common stockholders, and, as had been said, *supra*, p. 5, the preferred stockholders were in no way concerned with the organization, life or dissolution of the holding company.

Since, as is clear from its opinion, the Court below would have set aside the Commission's order had it concluded that the holding company did not organize the petitioner, the oppressive injustice of an untenable holding in this matter is apparent.

Respectfully submitted,

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